



**Mithamo v Nairobi Water & Sewerage Company (Petition E010 of 2022)
[2023] KEELRC 2753 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELRC 2753 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAKURU
PETITION E010 OF 2022
DN NDERITU, J
NOVEMBER 2, 2023**

BETWEEN

STEPHEN MATHENGE MITHAMO PETITIONER

AND

NAIROBI WATER & SEWERAGE COMPANY RESPONDENT

RULING

i. Introduction

1. In a petition dated 1st September, 2022 filed in person on 29th September, 2022 the petitioner is seeking the following reliefs –
 - a. A declaration that the summary dismissal of the petitioner from service vide a letter dated December 15, 2017 was illegal and unconstitutional as the entire process of disciplinary process was in breach of the Petitioner’s rights to fair labour practices and Fair Administrative of Actions Act as espoused under Article 27, 41, 47 and 50 of the Constitution of Kenya, 2010.
 - b. An order of *Certiorari* be issued to remove into the Honourable Court and quash the decision by the Respondent to dismiss the petitioner from service vide letter dated 15th December, 2017 be reinstated with back pay without any loss of benefits.
 - c. An order of *Mandamus* be issued compelling the Respondent to pay general damages to the petitioner for irregular breach of his Constitutional Rights under Article 43.
 - d. Any other order the Court may deem fit and just to grant.
 - e. Costs of the suit be awarded to the petitioner.



2. The respondent entered appearance on 27th October, 2022 through Udoto & Company Advocates and filed a notice of preliminary objection (PO) dated 7th November, 2022 raising the following issues for determination by the court –
 1. Court has no jurisdiction as the claim is barred by limitation.
 2. Extension of time: This Honourable court has no jurisdiction to extend time.
 3. Court has no jurisdiction as the claim is barred by lack of territorial jurisdiction.
3. Further, on 9th February, 2023 the respondent filed a replying affidavit sworn by George Oketch, the industrial relations coordinator for the respondent, in response to the petition.
4. When the matter came up in court on 22nd February, 2023 the court directed that the PO be disposed of first, ahead of the petition, as it raises fundamental issues of lack of jurisdiction for this court to hear and determine this matter. The respondent was directed to serve the pleadings, including the PO, upon the petitioner. Counsel for the respondent, Mr. Udoto, indicated that in view of the detailed PO, which in its nature included submissions on the grounds raised, he did not wish to file any further written submissions on the same.
5. When the matter came up for directions again on 13th March, 2023 the court observed and noted that the petitioner had been served with the PO, as per the affidavit of service on record, but no responses were filed. Counsel for the respondent then prayed that the PO be allowed on its merits as the same is not opposed.

ii. Background

6. In summary, the petitioner's case is that he was on 10th February, 2012 engaged by the respondent as a marketing assistant (scale 8) to work under the regional manager of the western side of the covered area within the City County of Nairobi. After a probationary period of six months the petitioner was confirmed to permanent and pensionable terms.
7. On 15th December, 2017 the petitioner was summarily dismissed from employment on grounds of gross misconduct for irregular, un-procedural, and suspected fraudulent allocation and installation of water meters contrary to the express directions and instructions from the respondent. He was accused of failure to follow the respondent's code of conduct and lack of integrity. Before the dismissal the petitioner was given a hearing which he now challenges as unfair and unlawful.
8. In the replying affidavit the respondent asserts that it operates within the capital city of Nairobi and its environs wherein the petitioner was based and worked.
9. It is deposed that the petitioner was summarily dismissed for gross misconduct pursuant to a fair hearing and due process.
10. It is denied that any statutory or constitutional rights of the petitioner were threatened, breached, or violated in the process before, during, and after the dismissal. It is emphasized that this petition is an abuse of the court process as the claim ought to have been filed as an ordinary cause and not as a constitutional petition.
11. It is on the foregoing circumstances that the respondent filed the PO raising the grounds alluded to above. The court shall deal with each of the grounds raised as hereunder.



iii. Analysis & Determination

12. On ground 1, it is pleaded that the petition has been filed out of time and the claim is time barred under Section 90 of the *Employment Act* (the Act) which provides that –
 90. Notwithstanding the provisions of section 4 (1) of the *Limitation of Actions Act*, no civil action or proceedings based or arising out of this Act or a contract of service in general shall lie or be instituted unless it is commenced within three years next after the act, neglect or default complained or in the case of continuing injury or damage within twelve months next after the cessation thereof.
13. It is submitted and argued that the petitioner was dismissed on 15th December, 2017 and the petition was filed on 29th September, 2022, almost five years after the fact. It is submitted that a claim on employment and labour relations shall be filed within three years and thereafter the same becomes stale and time barred.
14. Counsel has cited the Supreme Court *in The Matter of the Interim Independent Electoral Commission* (2011) eKLR and *Samuel Kamau Macharia & Another V Kenya Commercial Bank Limited & 2 Others* (2012) eKLR in laying emphasis that a court cannot innovate or craft its jurisdiction as jurisdiction is derived from the *Constitution*, statutes, a combination of the *Constitution* and statutes, or in rare instances from decided cases (precedents).
15. Counsel has submitted that the claim embodied in this petition is clearly, evidently, and unambiguously time barred under Section 90 of the *Act*. Counsel has firmed this argument with the decision in *Fred Mudave V G4S Services (K) Ltd* (2014) eKLR.
16. The court is in full concurrence with the submissions by counsel for the respondent as alluded to above that the claim herein is clearly and evidently time barred. If the petitioner hoped to disguise his claim as a constitutional petition with the hope of evading or circumventing the law on limitation, the plot has failed miserably as the above cited law and the decided cases are overwhelmingly against him. It does not matter that the claim has been filed as a constitutional petition.
17. On the foregoing ground alone, this petition shall be struck out.
18. For the sake of completeness, I must state that this court has no powers to expand or extend the time within which this claim ought to have been filed in court. Even if an application had been filed seeking for such orders, and none has been filed, the same should have been denied as the law is exact and particular that claims on employment and labour relations shall be filed in court within three years of the cause of action. Counsel has cited *Maria Machocho V Total Kenya Limited* (2013) eKLR and *Nicodemus Marani V Timesales Limited* (2014) eKLR in support of this position and the court agrees fully with that argument. Ground 2 of the PO is therefore upheld as well.
19. On ground 3, this court (ELRC) enjoys the status of the High Court and hence has nation-wide jurisdiction. However, it makes logical sense that claims should be filed in the nearest court with jurisdiction from where the cause of action arose. This is intended to reduce costs and logistics needed for the parties to prepare and attend the hearing. Although the magical innovation of virtual court has to a large extent reduced court attendance costs for parties and witnesses, there is still likelihood of relatively higher costs where the claim is filed in a court situate away from the *locus*.
20. The petitioner was employed at Nairobi and worked within the local limits of the capital city. In his pleadings he has provided his postal address to be in the capital city and presumably that is also his physical location or place of his abode. No reason has been cited for filing this matter at Nakuru rather



than at ELRC Nairobi. However, if this was the only ground raised in the PO the court would not have struck out the petition but would rather have made an order for the transfer of the cause from Nakuru to Nairobi. On its own, therefore, this ground should not have succeeded.

21. However, in view of the other two grounds raised above, this petition is hereby struck out with costs to the respondent.
22. Let me also state as follows. This petition is yet another misguided attempt by a litigant to un-procedurally and without merits elevating an ordinary claim for alleged wrongful and unlawful dismissal to a constitutional petition in total disregard of the law and in abuse of the court process. This is a trend that needs to come to an end and for that reason this petition was amenable to dismissal down the road either way.

iv. Orders

23. For all the foregoing reasons, the PO raised by the respondent vide a notice dated 7th November, 2022 is allowed for the reasons stated above and the petition herein struck out with costs to the respondent.

DATED, SIGNED, AND DELIVERED VIRTUALLY AT NAKURU THIS 2ND DAY OF NOVEMBER, 2023.

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DAVID NDERITU

JUDGE

